

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TOPPAN PHOTOMASKS, INC.,

Plaintiff,

v.

KEUN TAEK PARK,

Defendant.

Case No. 13-cv-03323-MMC (JCS)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SANCTIONS**

Re: Dkt. Nos. 57, 72

I. INTRODUCTION

In this trade secret and breach of contract suit, Plaintiff Toppan Photomasks, Inc. ("TPI") moves for sanctions in the form of adverse inferences and monetary sanctions against Defendant Keun Taek Park ("Park") for Park's alleged spoliation of evidence. *See* Pl.'s Mot. for Sanctions ("Mot."). Judge Maxine M. Chesney referred the Motion to a magistrate judge and ordered the parties to file a joint letter explaining the dispute. *See* Dkt. No. 61. The parties properly filed a joint letter on January 28, 2014. *See* Dkt. No. 72 ("J. Letter").¹ The Court finds that this Motion and Joint Letter are suitable for decision without oral argument. *See* Civ. L.R. 7-1(b). For the reasons set out below, the Court GRANTS IN PART AND DENIES IN PART TPI's Motion.

II. BACKGROUND

The following is a summary of the facts that are relevant to the instant motion. Unless

¹ TPI incorrectly asserts that Park was obligated to respond to the Motion on January 3, 2014. *See* J. Letter at 2–3. Judge Chesney's December 23, 2013 referral order clearly required the parties to file a joint letter, and it further explained that "[t]he Magistrate Judge *may* issue a ruling, *order more formal briefing*, or set a telephone conference or a hearing." *See* Dkt. No. 61 at 1 (emphasis added). TPI's citation to Civil Local Rule 7-7(d) is inapposite because the hearing on the instant Motion was vacated, not continued. *See id.* at 2; J. Letter at 4.

1 otherwise noted, these are the facts as alleged by TPI.

2 TPI is a company specializing in the development and manufacture of photomasks. Compl.
3 ¶ 7. A typical photomask consists of glass or quartz substrate coated with one or more thin films,
4 into which precise geometries are drawn. *Id.* Semiconductor manufacturers use photolithography
5 (a process that uses light) and chemical treatments to transfer the geometric pattern from the
6 photomask to a wafer, *i.e.*, a thin slice of semiconductor material that is used to make integrated
7 circuits and other microdevices. *Id.* ¶ 8. TPI uses a plasma dry etching process to create its
8 photomasks. *Id.* ¶ 9. The precise composition and control settings of the plasma used to create the
9 photomasks are highly confidential and proprietary data that have significant economic value. *Id.*
10 TPI's "plasma creation and dry etching processes" are trade secrets. *Id.* ¶ 11.

11 TPI hired Park as a Senior Process Engineer in September 1999, and he served in this
12 position until November 30, 2012 when he was terminated pursuant to a voluntary layoff plan. *Id.*
13 ¶¶ 13, 16. As a Senior Process Engineer, Park "was responsible for developing and modifying
14 processing techniques and methods applied in the manufacture, fabrication and evaluation of
15 photomasks." *Id.* ¶ 14. Park worked in TPI's secure factory in Round Rock, Texas. *Id.* ¶ 15. Upon
16 his initial hiring and termination, Park signed agreements to maintain the confidentiality of TPI
17 information by not using it or sharing it with anyone else. *See id.* ¶¶ 13, 16, 17. He signed a
18 "checklist" on his last day that specifically acknowledged his obligation not to "remove from the
19 premises" any confidential TPI information. *Id.* ¶ 17. TPI asserts that during his employment with
20 TPI, Park did not work from home, nor was he ever authorized to. *See* Decl. of Danielle Ochs in
21 Supp. of Pl.'s Mot. for Sanctions ("Ochs Decl."), Ex. A ¶ 10 (Decl. of Franklin Kalk in Supp. of
22 Mot. for TRO) ("Kalk Decl."), Ex. D ¶ 5 (Decl. of Lisa Lopez in Supp. of Mot. for TRO) ("Lopez
23 Decl.").

24 In May 2013, TPI learned that Park had taken a position with Compugraphics USA, Inc.
25 ("Compugraphics"), an industry competitor. Compl. ¶ 19. On May 21, 2013, in a telephone
26 conversation with TPI, Park confirmed that he had accepted employment with Compugraphics.
27 *See* Lopez Decl. ¶ 9. In a letter dated May 23, 2013, TPI advised Park that it intended to
28 discontinue the severance payments that he had been receiving pursuant to the voluntary layoff

1 plan, and it reminded Park of his post-employment confidentiality obligations. *Id.* Ex. F at 2
2 (“May 23 Letter”). TPI also demanded that Park “cease and desist any and all activities that [he
3 was] currently engaged in that contravene [his] obligations” under his voluntary layoff plan
4 agreements. *See id.* at 1.

5 On June 3, 2013, TPI contacted Compugraphics about Park. Compl. ¶ 20. In a phone
6 conversation with TPI, Compugraphics President Mark Crownover (“Crownover”) confirmed that
7 Park was working for Compugraphics as a staff engineer and was responsible for transferring
8 Compugraphics’ ten-year old dry etch process from its facility in Scotland to its facility in
9 Fremont, California, and that Park would also be responsible for managing the dry etch module in
10 Fremont. *Id.* Crownover assured TPI that Park would not be using TPI recipes or customer
11 knowledge. *Id.* That same day, Crownover followed up on the phone call with a letter to TPI
12 providing similar assurances. *Id.* ¶ 21.

13 After this correspondence with Crownover, TPI conducted a search of Park’s e-mail
14 activity prior to his termination from TPI. *Id.* ¶ 22. In or around July 2013, TPI discovered that on
15 November 29, 2012, one day prior to Park’s last day at TPI, Park sent two files from his TPI e-
16 mail address to his personal e-mail address. *Id.* ¶ 22; Ochs Decl. Ex. B ¶ 5 (Decl. of John Cochran
17 in Supp. of Mot. for TRO) (“Cochran Decl.”). The e-mail subject line was “files” and the body of
18 the e-mail did not contain a message. Cochran Decl. ¶ 5. The attached files were: (1) an Excel file
19 entitled “work daily tracking.xlsx” and (2) “work_daily.doc.” *Id.* TPI asserts that these files
20 contain highly confidential trade secrets worth millions of dollars. Compl. ¶ 22. Park asserts that
21 he had e-mailed these files to himself in order to prepare for a training he was going to conduct for
22 remaining TPI engineers on his last day. *See J. Letter* at 5. *See also* Ochs Decl. Ex. E at 82:8–
23 83:20 (“Park Dep.”) (testifying that in November 2012, he took TPI files home on a USB device
24 because he needed to “work at weekend . . . [and] to provide the training”). Park further asserts
25 that a trainee engineer “recollects being trained by Mr. Park on the contents of those same
26 documents.” *See J. Letter* at 5. TPI does not confirm or deny the existence of such a training.

27 On July 16, 2013, TPI’s counsel, Danielle Ochs (“Ochs”), attempted to contact Park by his
28 last known mobile telephone number to inform him that TPI would be filing a suit against him the

next day, and left him a voicemail. *See* Ochs Decl. ¶ 4. On July 17, 2013, TPI filed the instant suit, and Ochs e-mailed Park to notify him of the same. *See id.* ¶ 5. Ochs' e-mail included a specific instruction to preserve evidence:

[P]lease take notice that you are required to preserve all evidence in this case. Your deletion or destruction of any information, whether a device, or in hard copy or electronic form, will constitute spoliation of evidence and will result in further claims against you.

Ochs Decl. Ex. F. The Complaint was attached to the e-mail. *See id.*

On July 18, 2013, TPI filed a motion for a temporary restraining order ("TRO"). *See* Dkt. No. 6. That same day, Judge Chesney presided over a telephonic hearing regarding that motion; Park was still not represented by counsel at that time. *See* Ochs Decl. Ex. G ("TRO Hr'g Tr."). At the hearing, Judge Chesney indicated that she would grant the motion for the TRO in part, which was done the next day. *See id.*; Ochs Decl. Ex. H ("TRO"). Also during the hearing, Judge Chesney ordered Park to preserve evidence:

Sir, if you do have anything that's important to the case, now that you know what the case is about, don't throw it away or try to get rid of it, or you might be exposed to some other type of complaint.

Id. at 17:18–21. Park testified at his deposition on August 15, 2013 that he understood Judge Chesney's statements at the hearing as an order to refrain from deleting files from his Dell Inspiron laptop. *See* Park Dep. at 52:17–53:2. The TRO itself enjoined Park from "possessing, using or disclosing any of TPI's confidential information" and required him to "account (through expedited discovery) for and return to TPI any and all of TPI's property" TRO ¶¶ 2(b), 2(c).

On August 20, 2013, Park released twelve electronic devices to TPI's forensics inspector, Advanced Discovery.² Ochs Decl. ¶ 13. After inspecting Park's devices, Advanced Discovery informed the parties that it had identified thousands of deleted files, some of which were

² Advanced Discovery inspected twelve devices: (1) Dell Inspiron laptop, (2) HP Pavillion laptop, (3) Lenovo laptop, (4) Amazon Kindle Fire, (5) Seagate external hard drive, (6) SanDisk USB, (7) Office Depot USB, (8) Toshiba SD card, (9) TomTom SD card, (10) Multimedia SD card, (11) SanDisk Memory Stick, and (12) Sony Cyber Shot digital camera. Decl. of Aaron Magley in Supp. of Mot. ¶ 6. Park appears to have used these devices for both personal and work purposes. *See, e.g.*, Park Dep. at 39:3–11.

1 overwritten, meaning that they could only be recovered, if at all, through a process known as
 2 “carving.” *Id.*; Decl. of Aaron Magley in Supp. of Mot. ¶¶ 5–7, 9 (“Magley Decl.”). TPI has
 3 identified several deleted or overwritten files that have “strong indicators that they contain TPI
 4 data.” *See* Mot. at 8–9 (citing Magley Decl. ¶ 9); Supplemental Decl. of Franklin Kalk in Supp. of
 5 Mot. ¶¶ 3, 14 (“Kalk Suppl. Decl.”). TPI seeks monetary sanctions to compensate it for the costs
 6 of researching these devices; specifically, it seeks approximately \$20,000 in fees for Advanced
 7 Discovery, and \$14,000 in attorney’s fees in connection with this Motion.³ *See* Ochs Decl. ¶ 16,
 8 Ex. O.

9 Park argues that TPI is distorting the facts. He argues that there is no evidence that he
 10 actually used or disclosed any TPI information. *See* J. Letter at 5. Park asserts that he “had
 11 absolutely no need or desire for TPI documents,” and that he “simply . . . delete[d] those that were
 12 left on his computers from years of working from home.” *See id.* He asserts that he stopped
 13 deleting TPI files as soon as he retained counsel in July who helped him understand his
 14 obligations, and that he deleted no TPI files in August. *See id.* Specifically, he testified at his
 15 deposition that he had deleted TPI files from his Dell laptop from January to July 2013, but he did
 16 not recall whether he deleted any files in August 2013. Park Dep. at 48:17–53:22. Park points out
 17 that the forensic reports show that Park “sporadically deleted TPI-related documents at various
 18 intervals over the years.” *See* J. Letter at 6; Park Dep. at 52:11–13 (testifying that deletion of files
 19 was a “continuous activity” and “I didn’t delete whole file in just one day. I just look through it,
 20 and as I find it, I just delete it.”).

21 Additionally, Park asserts that he did not overwrite any of the deleted files manually;
 22 rather, overwriting occurs automatically when devices need more memory as a result of regular
 23 use. *See id.* TPI does not contest this characterization of overwriting. Park also asserts that
 24 “carving” to recover overwritten files is less expensive and has a higher likelihood of success than
 25 represented by TPI. *See id.* Finally, Park asserts that the “vast majority” of files deleted and
 26

27 ³ The Advanced Discovery invoices show that so far, the forensic investigation costs have been
 28 split with Park’s counsel. *See* Ochs Decl. Ex. O. The \$20,000 figure represents the costs incurred
 by TPI only. *See id.* TPI has not submitted documentation regarding attorney’s fees.

overwritten during the period from May to July 2013 were unrelated to TPI and irrelevant to the case, including systems and application files, temporary files, temporary internet and media files, and other computer-created files. *See id.*

III. LEGAL STANDARD

Courts are vested with inherent powers arising out of “the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). The Ninth Circuit has specifically recognized trial courts’ “inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence.” *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). These inherent powers include the ability to levy appropriate sanctions against a party who prejudices its opponent through the spoliation of evidence. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); *Apple Inc. v. Samsung Electronics Co., Ltd.*, 881 F. Supp. 2d 1132, 1135 (N.D. Cal. 2012) (citing *Glover*, 6 F.3d at 1329).

A trial court’s discretion regarding the form of a spoliation sanction is broad, and sanctions can range from the minor, such as the awarding of attorneys’ fees, to the more serious, such as dismissal of claims or instructing the jury that it may draw an adverse inference. *Apple*, 881 F. Supp. 2d at 1136 (citing *Leon*, 464 F.3d at 958, 961; *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386–87 (9th Cir. 2010)) (some citations omitted). The determination of an appropriate sanction “is assessed on a case-by-case basis.” *Io Grp. Inc. v. GLBT Ltd.*, C-10-1282 MMC DMR, 2011 WL 4974337, at *3 (N.D. Cal. Oct. 19, 2011) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)) (internal citations omitted).

To determine whether spoliation occurred, the majority of courts use some variation of the three-part test set forth by Judge Scheindlin. *Apple*, 881 F. Supp. 2d at 1138 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 215 (S.D.N.Y. 2003) (“*Zubulake IV*”). That test has three elements: “(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind;’ and (3) that the evidence was ‘relevant’ to the party’s claim or defense such that a reasonable trier of

fact could find that it would support that claim or defense.” *Zubulake IV*, 220 F.R.D. at 220.

If spoliation is found, then courts generally consider three factors to determine whether and what type of sanctions to issue: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.” *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559, 563 (N.D. Cal. 2008) (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)) (courts should choose “the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim”). After considering these factors, a court may decide to defer or decline to grant sanctions, despite a finding of spoliation. *See, e.g., Hamilton v. Signature Flight Support Corp.*, C 05-0490 CW (MEJ), 2005 WL 3481423, at *8 (N.D. Cal. Dec. 20, 2005) (finding spoliation but declining to impose adverse inference sanctions because of lack of prejudice).

IV. ANALYSIS

A. Spoliation

For the reasons explained below, the Court finds that TPI has made a limited showing of spoliation. Although it is not entirely clear how many of the deleted or overwritten files meet the test for spoliation, the Court determines that something less than 1,650 files have been spoliated.

1. Park’s duty to preserve evidence

Litigants have a duty to preserve “what [they know], or should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.” *Io Grp.*, 2011 WL 4974337, at *5 (quoting *Zubulake IV*, 220 F.R.D. at 217). As to when the duty arises, it “arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *World Courier v. Barone*, C 06-3072 TEH, 2007 WL 1119196, at *1 (N.D. Cal. Apr. 16, 2007) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)).

TPI argues that Park had an obligation to preserve data by no later than May 23, 2013 when TPI sent Park a letter advising him that it intended to discontinue the severance payments,

1 reminding him of his confidentiality obligations, and stating that “[i]f TPI suspects any further
2 breach of your obligations . . . or inducement of breach by Compugraphics, or any other violations
3 of state and federal law which result in harm to TPI,” then TPI would take legal action. *See* Mot. at
4 15; May 23 Letter at 3. TPI also appears to argue that its May 23, 2013 letter to Crownover, which
5 Crownover and Park discussed at some point, should have given rise to Park’s duty. *See* Mot. at 6
6 (citing Park Dep. 322:22–323:9). TPI further notes that on July 17, 2013, the day that this
7 litigation commenced, TPI specifically stated in an e-mail to Park that he must not delete any
8 information that might become evidence. *See* Mot. at 15–16; Ochs Decl. Ex. F. Additionally, TPI
9 notes that during the TRO hearing on July 18, 2013, Judge Chesney expressly told Park not to
10 “throw [] away or try to get rid of” anything “important to the case.” *See* Mot. at 16; TRO Hr’g Tr.
11 at 17:18–21.

12 Park does not clearly state his position as to when his duty arose. He appears to assert that
13 he did not have any duty until he retained counsel sometime in July 2013. *See* J. Letter at 5 (“Once
14 [Park] did get counsel, and thus had explained to him his legal obligations to preserve evidence, he
15 deleted nothing further.”); Ochs Decl. ¶ 8 (declaring that Ochs became aware of Park’s retention
16 of counsel on July 24, 2013). Park also notes that the May 23 Letter did not specifically instruct
17 him to seek counsel or save any TPI files. *See* J. Letter at 6.

18 The Court finds that Park’s duty arose when litigation was first threatened in the May 23
19 Letter. This letter put Park on notice that he could be sued regarding his employment at
20 Compugraphics. *See* May 23 Letter at 3 (“If TPI suspects any further breach of your obligations
21 by you . . . TPI will take any and all legal action necessary against you and/or Compugraphics
22 . . .”). At that point, Park should have known that certain evidence in the form of TPI files on his
23 electronic devices “may be relevant to anticipated litigation” regarding his employment at
24 Compugraphics. *See World Courier*, 2007 WL 1119196, at *1 (citation omitted). The Court also
25 notes that before Park received the May 23 Letter, he received a call from a TPI representative
26 reminding him of his continuing post-employment confidentiality obligations. *See* Lopez Decl.
27 ¶ 9. Additionally, around the same time, Park and Crownover had a conversation about TPI’s
28 letter to Crownover. *See* Park Dep. 322:22–323:9. Both of these interactions support the

conclusion that it was reasonable for Park to have known that litigation was possible, and that he should preserve potentially relevant evidence.

As to the duty's scope, the Court finds that Park was obligated to preserve any files containing TPI information that he had on his electronic devices, because such files would have been "reasonably calculated to lead to the discovery of admissible evidence" and "reasonably likely to be requested during discovery." *See Zubulake IV*, 220 F.R.D. at 217 (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991); *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)). The May 23 Letter specifically stated TPI's position that Park's employment with Compugraphics was not compatible with the confidentiality agreements that he had signed upon termination. *See* May 23 Letter at 1. Thus, Park should have known that any TPI files covered by the confidentiality agreements were potentially relevant. However, Park did not have a duty to preserve *all* of the files on his electronic devices, such as temporary internet files or other files that plainly do not have anything to do with this case. *See Zubulake IV*, 220 F.R.D. at 217 (a party need not preserve "every shred of paper, every e-mail or electronic document").

2. Park's state of mind

The Ninth Circuit has recognized "the power of the district court to sanction under its inherent powers not only for bad faith, but also for willfulness or fault by the offending party." *Unigard*, 982 F.2d at 368 n.2. "A party's destruction of evidence qualifies as willful spoliation if the party has some notice that the documents were *potentially* relevant to the litigation before they were destroyed." *Leon*, 464 F.3d at 959 (internal quotation marks and citation omitted) (emphasis in original). "All that the court must find is that [the spoliating party] acted with a 'conscious disregard' of its obligations." *Apple*, 881 F. Supp. 2d at 1147.

TPI argues that Park willfully and knowingly destroyed evidence after he knew or should have known that he had a duty to preserve evidence. *See* Mot. at 16. TPI points out that Park admitted at his deposition that it was "[b]ad judgment" to delete TPI files after Judge Chesney's instruction at the TRO hearing. *See id.*; Park Dep. 53:14–18.

Park argues that he did not understand his duty to preserve evidence until he retained

counsel in July 2013. *See* J. Letter at 5. Park asserts that he “mistakenly concluded that deleting TPI’s documents was in accord with” what he understood as his responsibility “not to use or disclose any TPI information.” *See* J. Letter at 7. He further asserts that he did not intentionally overwrite any documents, but rather that they were automatically overwritten as a result of Park’s regular day-to-day use of his computers. *See id.* at 5.

The Court finds that despite Park’s apparent confusion about his obligations, Park acted willfully in deleting or overwriting certain files after receiving the May 23 Letter because there is no evidence that he did not receive the letter, or that he did not understand the letter’s express threat of a lawsuit. *See Hamilton*, 2005 WL 3481423, at *5 (negligent destruction of evidence was sufficient to show culpable state of mind for spoliation); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 198–99 (D.S.C. 2008) (defendants acted willfully in spoliating evidence on laptops by overwriting files through continued use, even though there was no showing that they had intended to overwrite the files; it was enough that they knew the laptops contained potentially relevant information). Having received the May 23 Letter, Park had notice of what types of files were “potentially relevant”—*i.e.*, any TPI files covered by the confidentiality agreements—and he acted with “conscious disregard” of his duties to preserve this evidence when he deleted files and continued to use his devices in a way that led to the overwriting of files. *See Leon*, 464 F.3d at 959; *Apple*, 881 F. Supp. 2d at 1147.

3. The relevance of destroyed evidence to TPI’s case

A finding of spoliation requires a finding that the destroyed evidence was “‘relevant’ to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Zubulake IV*, 220 F.R.D. at 220.

TPI argues that the files deleted and overwritten by Park were relevant to key issues in TPI’s trade secret and breach of contract claims. *See* Mot. at 17. Specifically, TPI argues that in order to establish a claim for the misappropriation of trade secrets, TPI must show that Park “improperly acquired and/or used or disclosed its trade secrets.” *See id.* (citing Cal. Civ. Code § 3426.1). TPI argues that it “cannot prove that Park acquired the destroyed data from TPI or that the destroyed data contained trade secrets” if that data was destroyed. *See* Mot. at 17. TPI further

argues that it cannot look for “red flags” as to whether any trade secrets were used or disclosed by Park while at Compugraphics if that data was destroyed. *See id.* A TPI declaration attests to the relevance of thirty-five deleted and recovered documents that contain TPI trade secrets. *See* Kalk Suppl. Decl. ¶¶ 13, 14. TPI argues that the relevance of these recovered documents gives rise to the inference that many of the other deleted and overwritten documents were also relevant. *See* Mot. at 16–17.

Park does not argue that all of the deleted and overwritten TPI files were irrelevant to TPI’s case, but rather he argues generally that he never intended to and did not use or share the files. *See* J. Letter at 6. As to non-TPI files such as computer-created system files, Park argues that such files are plainly irrelevant. *See id.*

The Court agrees with TPI that the contents of certain deleted and overwritten files are relevant to TPI’s case. However, it is apparent that only a subset of the total number of deleted or overwritten files are relevant.

First, only a fraction of the 241,015 deleted or overwritten files are user files. *See* Magley Decl. ¶ 8. According to the declaration of Advanced Discovery’s Aaron Magley (“Magley”), user files are typically word processor files, e-mails, spreadsheets, presentations, and so forth. *See id.* ¶ 8 n.1. This is in contrast to system files, which may be computer-created and are unlikely to contain user data. *See id.* Although there is some confusion as to how many of the deleted and overwritten files are user files, it appears that there are between 816 and 1,650 user files.⁴ TPI does not present a meaningful argument that any of the non-user files are relevant. Accordingly, TPI has shown that between 816 and 1,650 files have more than a trivial possibility of being relevant.

Second, it appears that only a portion of the 816 to 1,650 user files were deleted after Park’s duty arose on May 23, 2013. Magley’s declaration cites generally to the deleted file log exhibits, which list files deleted or overwritten both before and after May 23, 2013. *See id.* Exs.

⁴ Magley declares that 241,015 files, including 816 user files, were deleted before Advanced Discovery received the devices on August 20, 2013, with no beginning date specified. *See* Magley Decl. ¶ 8. However, the total number of deleted files calculated by totaling Magley’s device-by-device narratives in his declarations, which cover five of the twelve devices, is 1,650 user files. *See id.*

A–E. However, these file logs total over 6,700 pages, are not sorted in any obvious way, and do not distinguish between user files and computer-created or system files. *See id.* The Court declines to peruse the file logs itself and tally the number of user files that were deleted or overwritten after Park’s duty arose and, as a result, it is not clear on this record how many files actually fall into this category.⁵ Nonetheless, the Court finds that TPI has presented sufficient evidence to give rise to an inference that a substantial number of the deleted or overwritten files were relevant and deleted or overwritten after his duty arose.⁶

B. Adverse Inference Sanctions

Having found that some spoliation has occurred, the Court turns to the question of what sanctions, if any, are appropriate. Park is correct that the Court should consider the *Schmid* factors in making this determination. *See* J. Letter at 6. These factors are: (1) the degree of fault of the party who destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether a lesser sanction would avoid substantial unfairness to the opposing party. *Nursing Home Pension Fund*, 254 F.R.D. at 563 (quoting *Schmid*, 13 F.3d at 79).

TPI seeks sanctions in the form of the following adverse inferences:

If Park had preserved and produced the deleted and destroyed data it would have shown that (1) Park acquired some or all of the data from TPI (“TPI data”); (2) Park failed to satisfy his duty to return to TPI the data he acquired; (3) some or all of the TPI data he acquired was confidential; (4) some or all of the TPI data he acquired constituted and/or contained TPI trade secrets; (5) Park used TPI’s trade secrets in his work at Compugraphics; and (6) TPI was prejudiced by Park’s conduct.

⁵ For example, the Court notes that although Franklin Kalk’s declaration describes thirty-five deleted and recovered documents as relevant, it is not clear whether these documents were deleted before or after Park’s duty arose. *See* Kalk Suppl. Decl. ¶¶ 8–13.

⁶ The Court notes that TPI specifically identified by filename eight documents that were deleted or overwritten after Park’s duty arose: (1) “Qz etch tracking,” (2) “toppan_lam,” (3) “PHOLO,” and (4) “Grating_1492275_return,” all overwritten from the Dell Inspiron laptop between May 26 and May 31, 2013; (5) “dry etch process plan,” and (6) “dry etch plan,” both overwritten from the SanDisk USB device between July 3 and July 14, 2013; (7)–(8) two files with “quartz etch” in the filename, both deleted from the Seagate hard drive on July 17, 2013. *See* Mot. at 9; Magley Decl. ¶¶ 9, 10, 11.

J. Letter at 1. For the reasons explained below, the record is not sufficiently developed to justify the granting of these adverse inference sanctions.

1. Degree of Park's Fault

"A party's destruction of evidence need not be in 'bad faith' to warrant a court's imposition of sanctions." *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1066 (N.D. Cal. 2006) (quoting *Glover*, 6 F.3d at 1329; *Unigard*, 982 F.2d at 368 n.2). "However, a party's motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed." *Id.* at 1066–67 (citations omitted).

A spoliator's degree of fault may vary depending on the moment of inquiry. In this case, Park's degree of fault for deleting or overwriting documents at the inception of his duty on May 23, 2013 was not particularly high because he was pro se and apparently confused about his duty to preserve evidence. *See Keithley v. Homestore.com, Inc.*, C-03-04447 SI (EDL), 2008 WL 4830752, at *3 (N.D. Cal. Nov. 6, 2008) (pro se status is "perhaps a mitigating factor in terms of the severity of sanctions"). Park's argument appears to be consistent with the record. *See* J. Letter at 6. For example, the fact that Park sporadically deleted documents after his departure from TPI, well before any lawsuit was on the horizon, supports his argument that he had not intended to use the TPI files that he had kept. *See* J. Letter at 5; Park Dep. at 48:17–20 (Park testifying that between January and July, he continuously deleted TPI files).⁷ Further, as to the two e-mailed documents that sparked this lawsuit, Park asserts that he had e-mailed these files to himself in order to prepare for a training he was going to conduct on his last day, and that a trainee engineer recalls being trained on the contents of these documents. *See* J. Letter at 5. *See also* Park Dep. at 82:8–83:20. TPI has not denied that this training occurred.

However, Park's degree of fault increased when he continued to delete and overwrite documents after receiving Ochs' July 17, 2013 e-mail, which informed him that the underlying

⁷ The Court also notes that Park testified that while employed at TPI, he was permitted access to the TPI network from his personal computer at home, and this privilege was revoked upon his termination. *See* Park Dep. at 39:18–25. Such access is inconsistent with TPI's assertions that Park did not or was not authorized to work at home. *See* Kalk Decl. ¶ 10; Lopez Decl. ¶ 5.

1 complaint had been filed, and which contained express instructions to refrain from deleting
 2 evidence. *See* Ochs Decl. ¶ 5, Ex. F (“[Y]ou are required to preserve all evidence in this case.
 3 Your deletion or destruction of any information, whether a device, or in hard copy or electronic
 4 form, will constitute spoliation of evidence and will result in further claims against you.”). There
 5 is no evidence that he did not receive or understand this clear admonition. And even though he
 6 was pro se until approximately July 24, 2013, he was still “expected to abide by the rules of the
 7 court in which he litigates,” and this included fulfilling his duty not to spoliage evidence. *See*
 8 *Carter v. CIR*, 784 F.2d 1006, 1008 (9th Cir. 1986).

9 Park’s degree of fault increased further still to the level of bad faith when he continued to
 10 delete and overwrite documents after Judge Chesney ordered him to refrain from deleting
 11 evidence at the July 18, 2013 TRO hearing. *See* TRO Hr’g Tr. at 17:18–21 (“Sir, if you do have
 12 anything that’s important to the case . . . don’t throw it away or try to get rid of it, or you might be
 13 exposed to some other type of complaint.”). Park testified that he understood Judge Chesney’s
 14 statements as an order to refrain from deleting files from his Dell Inspiron laptop. *See* Park Dep. at
 15 52:17–53:2. Additionally, the TRO, which was issued on the same day, gave Park notice that any
 16 TPI files in his possession were TPI’s property and they needed to be returned. *See* TRO ¶¶ 2(b)
 17 (“Defendant is enjoined from possessing . . . any of TPI’s confidential information . . .”), 2(c)
 18 (“Defendant is required to account . . . for and return to TPI any and all of TPI’s property,
 19 including its Trade Secrets obtained by Defendant from TPI”).

20 Finally, the Court notes that Park and his counsel appear to have caused delays in turning
 21 over all of the devices to Advanced Discovery for inspection. *See* Mot. at 11; Ochs Decl. Exs. I–L.

22 Although Park’s degree of fault was not high at the inception of his duty, his degree of
 23 fault increased when he continued to destroy evidence after receiving Ochs’ July 17, 2013 e-mail,
 24 and increased further still to the level of bad faith when he continued to destroy evidence after
 25 Judge Chesney’s order at the July 18, 2013 TRO hearing. Thus, this factor weighs in favor of
 26 granting sanctions in the form of adverse inferences.

27 **2. Degree of prejudice to TPI**

28 As to prejudice, the inquiry “looks to whether the spoiling party’s actions impaired the

1 non-spoiling party's ability to go to trial or threatened to interfere with the rightful decision of the
 2 case." *Leon*, 464 F.3d at 959 (internal quotation marks and alterations omitted). To show
 3 prejudice, the moving party "usually sets forth some type of extrinsic evidence as to the content of
 4 the missing materials which demonstrates the extent to which such materials would have been
 5 harmful to the spoliator. This corroboration is especially important where the destruction is merely
 6 negligent since there is no bad faith in such cases from which to infer the evidence would have
 7 been detrimental to the spoliator." *Hamilton*, 2005 WL 3481423, at *8 (quoting *Skeete v.*
 8 *McKinsey & Co., Inc.*, No. 91 Civ. 8093 (PKL), 1993 WL 256659, at *7 (S.D.N.Y. 1993)).

9 Where a non-spoiling party has other evidence to prove its case, the degree of prejudice
 10 is lower, and a court may decline to impose adverse inference sanctions. *See, e.g., Nursing Home*
 11 *Pension Fund*, 254 F.R.D. at 564 ("plaintiffs have not demonstrated the degree of prejudice
 12 necessary to warrant terminating sanctions . . . primarily because plaintiffs have received a large
 13 quantity of materials through the discovery process"); *In re Napster*, 462 F. Supp. 2d at 1077
 14 (although finding spoliation, refraining from imposing default sanctions because, "[a]t this stage
 15 of the proceedings, when the full evidentiary record has not yet been considered by the court or by
 16 a jury, the court cannot determine the extent of prejudice created by [spoliator's] failure to
 17 preserve its emails."); *Ahcom, Ltd. v. Smeding*, No. 07-1139 SC, 2011 WL 3443499, at *8–*9
 18 (N.D. Cal. Aug. 8, 2011) (concluding that both terminating and adverse inference sanctions were
 19 inappropriate where destruction of computer that contained defendant's financial information was
 20 "highly unlikely" to have materially affected the outcome of the case—namely, the alter ego
 21 determination—because plaintiff had "extensive information" as to defendant's finances);
 22 *Hamilton*, 2005 WL 3481423, at *8 (denying sanctions for negligent destruction of part of
 23 surveillance video for lack of prejudice because plaintiffs failed to provide extrinsic evidence that
 24 remaining portion of video was inaccurate and because plaintiffs had other evidence available); *In*
 25 *re Hitachi Television Optical Block Cases*, 08CV1746 DMS NLS, 2011 WL 3563781, at *11
 26 (S.D. Cal. Aug. 12, 2011) (although finding spoliation, declining to impose adverse inference
 27 sanctions because there was "no evidence that would lead the Court to conclude [the] spoliation
 28 has impaired Plaintiffs' ability to go to trial, threatened to interfere with the rightful decision of the

case, or forced Plaintiffs to rely on incomplete and spotty evidence”).

Here, TPI argues that it is disadvantaged because it does not have all of the contents of the TPI files that Park deleted from his devices. *See* Mot. at 16–17; J. Letter at 3–4. Specifically, TPI argues that without the deleted and overwritten files, “it is more difficult . . . to show not only that Park acquired certain specific trade secrets and confidential documents which he failed to return, but also the extent to which he may have used those documents in connection with the work he was performing for his subsequent employer, Compugraphics.” *See* Mot. at 13 (citing Kalk Suppl. Decl. ¶ 4). TPI explains that “[w]ithout access to the contents of the documents he deleted, it would be impossible or very difficult and expensive to determine whether the information contained in those documents was utilized on the Compugraphics tools.” *See* Mot. at 13 (citing Kalk Suppl. Decl. ¶ 5). Further, TPI argues that it “cannot determine the general risk it faces from Park’s possession of certain trade secrets without having access to the information contained in those trade secret documents.” *See* Mot. at 13–14 (citing Kalk Suppl. Decl. ¶ 6). Park argues that this issue cannot be decided on the present record. *See* J. Letter at 7–8.

The Court generally agrees with Park. TPI has not shown evidentiary prejudice that would justify its proposed adverse inferences. Many of the deleted files have already been recovered, which means that TPI has some evidence to prove its case. *See Ahcom*, 2011 WL 3443499, at *8–*9; *Hamilton*, 2005 WL 3481423, at *8. Further, the parties have not yet attempted carving, which may recover some or all of the overwritten files and which will likely result in more evidence to prove TPI’s case. *See In re Napster*, 462 F. Supp. 2d at 1077.

Thus, this factor weighs against granting adverse inferences at this time.

3. Suitability of lesser sanctions

Rejection of lesser sanctions is appropriate if (1) no lesser sanction could both punish the spoliator and deter others similarly tempted, and (2) the facts show that deceptive conduct has occurred and will continue. *Io Grp.*, 2011 WL 4974337, at *8 (citing *Advantacare Health Partners, LP v. Access IV*, No. 03-4496, 2004 WL 1837997, at *6 (N.D. Cal. Aug. 17, 2004)). An adverse inference sanction is an “extreme sanction” that “should not be given lightly.” *See Zubulake IV*, 220 F.R.D. at 219.

Here, the Court finds that the adverse inferences sought by TPI are not warranted. TPI has shown the spoliation of fewer than 1,650 files out of the 240,000 files that it asserts were destroyed, many of which have been fully restored. The remaining overwritten files may yet be restored by carving. TPI has not shown a likelihood that there is risk of erroneous judgment in the absence of sanctions. Additionally, Park does not appear poised to continue deleting evidence.

Accordingly, the Court's intervention through adverse inference sanctions would be inconsistent with the purposes of sanctions. *See Apple*, 881 F. Supp. 2d at 1136 (citations and internal quotation marks omitted) ("Any remedy applied to a spoliator should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been absent the wrongful destruction of evidence by the opposing party.").

Thus, this factor weighs in favor of the imposition of lesser sanctions than those requested by TPI.

4. Summary of adverse inference analysis

The Court has considered Park's degree of fault, and finds that though it was not particularly high at the inception of his duty on May 23, 2013, it increased after Ochs' July 17, 2013 e-mail, and increased further still to the level of bad faith after Judge Chesney's July 18, 2013 order during the TRO hearing. The Court has considered TPI's degree of prejudice, and it finds that on the current record, there is no evidentiary prejudice as to the deleted files, and it is not yet possible to determine the degree of evidentiary prejudice as to the overwritten files. The Court finds that in light of this incomplete showing of prejudice, the adverse inferences sought by TPI are not appropriate. Accordingly, although the Court finds that some spoliation has occurred, it declines to impose any adverse inference sanctions.

C. Monetary Sanctions

Pursuant to its inherent powers, a district court may award monetary sanctions in the form of attorney's fees against a party or counsel who acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Leon*, 464 F.3d at 961 (quoting *Primus Auto. Fin. Servs., Inc. v. Batarsee*, 115 F.3d 644, 648 (9th Cir. 1997)). Before awarding monetary sanctions pursuant to its inherent

1 powers, “the court must make an express finding that the sanctioned party’s behavior ‘constituted
2 or was tantamount to bad faith.’” *Leon*, 464 F.3d at 961 (citing *Primus Auto.*, 115 F.3d at 648). A
3 party “demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of
4 a court order.” *Leon*, 464 F.3d at 961 (citing *Primus Auto.*, 115 F.3d at 648). The amount of the
5 sanction must be “reasonable.” *Leon*, 464 F.3d at 961 (quoting *Brown v. Baden (In re Yagman)*,
6 796 F.2d 1165, 1184 (9th Cir. 1986), *as amended by* 803 F.2d 1085 (9th Cir. 1986)).

7 Here, TPI argues that it has incurred monetary costs in the form of recovering the deleted
8 files and attorney’s fees in bringing this motion. *See* Mot. at 19. The Court agrees that TPI has
9 incurred costs associated with the spoliation. The Court also finds that Park has acted willfully and
10 with varying degrees of fault, including bad faith, after Park continued to delete or overwrite files
11 after Judge Chesney’s July 18, 2013 order during the TRO hearing. *See* Parts IV.A.2., IV.B.1.,
12 *supra*. Thus, the Court finds that it is proper to impose monetary sanctions pursuant to its inherent
13 powers.

14 Separately, a court may also issue monetary sanctions for “fail[ing] to obey an order to
15 provide or permit discovery.” Fed. R. Civ. P. 37(b)(2). Specifically, a court may “order the
16 disobedient party, the attorney advising that party, or both to pay the reasonable expenses,
17 including attorney’s fees, caused by the failure, unless the failure was substantially justified or
18 other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C). A finding of
19 bad faith is not required for monetary sanctions under Rule 37. *Dong Ah Tire & Rubber Co., Ltd.*
20 *v. Glasforms, Inc.*, C 06-3359 JF (RS), 2009 WL 1949124, at *4 (N.D. Cal. July 2, 2009)
21 *modified*, C 06-3359 JF (RS), 2009 WL 2485556 (N.D. Cal. Aug. 12, 2009) (citing *Hyde & Drath*
22 *v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994)).

23 Here, the Court finds that Park violated Judge Chesney’s July 18, 2013 order to preserve
24 evidence, and the TRO itself, when he deleted or overwrote TPI files after those court orders were
25 given. *See* TRO Hr’g Tr. at 17:18–21; TRO ¶¶ 2(b), 2(c); Park Dep. at 53:14–22 (admitting that he
26 deleted TPI files after Judge Chesney’s order during hearing on July 18, 2013). Although it is not
27 clear on this record exactly how many relevant files were wrongfully deleted after the TRO and
28 Judge Chesney’s order, *see* Part IV.A.3, *supra*, the parties do not appear to dispute that Park

deleted or overwrote some number of files after these court orders were issued. Additionally, TPI submitted copies of e-mail correspondence between TPI and Park's counsel in the days leading up to Park's production of his electronic devices, which suggest that Park delayed timely turning over all of his electronic devices to Advanced Discovery and, as a result, may have violated the TRO in that way. *See* Ochs Decl. Exs. I–N; TRO ¶ 2(c). Thus, the Court finds that it is proper to impose monetary sanctions under Rule 37.

The Court also notes there is no question that Park's deletion of documents gave rise to the Advanced Discovery fees and prompted the instant Motion. Courts considering similar circumstances have found it appropriate to award expenses. *See, e.g., In re Napster*, 462 F. Supp. 2d at 1078 (observing that "[m]onetary sanctions may be imposed where one party has wrongfully destroyed evidence" and imposing reasonable attorney's fees associated with bringing motion for sanctions) (citing *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 558 (N.D. Cal. 1987)); *Zubulake IV*, 220 F.R.D. at 222 ("Even though an adverse inference instruction is not warranted, there is no question that e-mails that UBS should have produced to Zubulake were destroyed by UBS. That being so, UBS must bear Zubulake's costs for re-deposing certain witnesses for the limited purpose of inquiring into issues raised by the destruction of evidence"); *Net-Com Servs., Inc. v. Eupen Cable USA, Inc.*, CV 11-2553 JGB SSX, 2013 WL 4007785, at *3 (C.D. Cal. Aug. 5, 2013) ("While it is not yet clear whether or to what degree [defendant] has been prejudiced, the Court finds it appropriate for [plaintiff], due to [its] negligence, to bear the full cost of restoring and producing data on the hard drives submitted to [forensics expert].").

Accordingly, the Court imposes the following monetary sanctions pursuant to its inherent powers and, alternatively, pursuant to Rule 37(b)(2)(C): (1) Park shall pay the costs of Advanced Discovery fees incurred to date; (2) Park shall pay the costs of carving all overwritten user files that were deleted or overwritten after his duty to preserve evidence arose on May 23, 2013; and (3) after further briefing, Park shall pay reasonable attorney's fees and costs associated with this Motion, including the fees and costs associated with the further briefing. The parties shall meet and confer regarding a briefing schedule, which shall require TPI to submit an opening brief and documentation of its attorney's fees and costs in the form of time sheets or similar records. Park


1 shall submit an opposition within one week of the opening brief, and TPI shall submit a reply
2 within one week of the opposition. Briefs shall not exceed ten pages, excluding exhibits. The
3 parties shall file a stipulation with the briefing schedule within fourteen days of the date of this
4 Order.

5 **V. CONCLUSION**

6 For the foregoing reasons, the Motion is DENIED as to adverse inference sanctions, and it
7 is GRANTED IN PART as to monetary sanctions, as described above.

8 **IT IS SO ORDERED.**

9 Dated: May 29, 2014

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12 JOSEPH C. SPERO
13 United States Magistrate Judge
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